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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1339 OF 1998

1. Principal,
   B.K.M. High School, Mumbai.
2. President,
   Bhagani Kalamandir High School,
   Bandstand, Mumbai. ... Petitioners

V/s

Shri Keshab Achari, Thane. ... Respondent

Mr. Vineet B. Naik i/by M/s. Dhruve Liladhar & Co. for the petitioners.

Mr. Vijay Gharat for the respondent.

CORAM: SMT. NISHITA MHATRE, J.

DATED: 21ST SEPT., 2007.

ORAL JUDGMENT:

1. The petition challenges the order of the School Tribunal dated 13.1.1998 in Appeal No.BOM/127 of 1996. By this order the School Tribunal has allowed the appeal and set aside the order of termination of service dated 26.11.1996. The Tribunal has directed the petitioners to reinstate the respondent No.1 with continuity of service and full back wages.

2. The 1st respondent was employed as an Assistant

Teacher on probation from 1.8.1995. He was in service for the period from August 1995 to April 1996. It appears that on 10.7.1996 he raised a grievance regarding the mode of payment of salary. A memo was served to the respondent on 14.8.1996 on account of his late attendance for the First Mid-Term Test of 1996 for which the respondent had been appointed an Invigilator. As he was not present at the specified time in the school, the petitioners, requested the respondent to act more responsibly. On 24.8.1996 a memo was issued to the respondent indicating that the answer-sheets of one of the pupils, who appeared for an examination held on 6.8.1996 where the respondent was the invigilator, were found to be missing. An explanation was submitted by the respondent indicating that he had reached the school late on 5.8.1996. Significantly, this explanation has been submitted one month and 15 days after he was issued a memo on 14.8.1996. By another letter of 4.9.1996, the respondent explained his position with regard to the allegations in the second memo. According to the respondent, the answer sheets were missing not due to any fault of his but because of the pupil who had taken away the answer-sheets of the examination conducted on 6.3.1996. On 26.11.1996, the petitioners, being unsatisfied with the work and behaviour of the respondent, terminated his services in accordance with

the provisions of the M.E.P.S. Act. Being aggrieved by the decision of the petitioners, the respondent filed an appeal before the School Tribunal being Appeal No.BOM/127 of 1996.

3. In his appeal memo, the respondent contended that his services have been terminated without following the due process of law. It was contended that no charge-sheet had been issued to him nor was any enquiry held by the petitioners prior to the termination of his services. It was, therefore, contended that the rules of natural justice had been breached by the petitioners while terminating his services.

4. The petitioners filed their written statement in response to the appeal preferred by the respondent employee. They contended that the respondent was appointed on probation for a period of two years. During the period of probation it was found that the services of the respondent were not satisfactory. It was also contended in the written statement that memos had been issued to the respondent workman to bring to his notice the fact that his work and conduct was unsatisfactory. It is pleaded that since the respondent did not improve his work and behaviour, the petitioners decided to terminate his services on completion of the

period of probation. It was also contended that the order of termination of service dated 26.11.1996 is not stigmatic and, therefore, there was no necessity of holding an enquiry against the respondent prior to terminating his services. The petitioners pointed out that they had complied with Section 5(3) of the M.E.P.S. Act while terminating the services of the respondent.

5. The School Tribunal has held that the petitioners have violated the provisions of the M.E.P.S. Act and the rules framed thereunder by not holding an enquiry while terminating the services of the respondent. The Tribunal has held that, when the petitioners had found that the respondent was not suitable for the post, it did not mean that his performance was unsatisfactory. The Tribunal proceeded on footing that termination of service on the ground of unsuitability or unsatisfactory behaviour was as a result of the objections raised by the respondent regarding his salary, etc. According to the Tribunal, the material on record does indicate that the performance of the respondent as an Assistant Teacher was unsatisfactory. The Tribunal has concluded that, in fact the action of the petitioners was by way of punishment which ought to have been preceeded by an enquiry.

6. The learned counsel appearing for the petitioners submits that the order of termination dated 26.11.1996 is not stigmatic and, therefore, no enquiry was required to be held before terminating the services of a probationer. He submits that, a person who is employed on probation can be terminated from service when his work or his behaviour is found to be unsatisfactory by the school. The petitioners have found that the work and behaviour of the respondent was unsuitable and, therefore, unsatisfactory. According to the learned counsel, the petitioners had exercised their power under Section 5(3) of the M.E.P.S. Act. One month's salary was paid to the respondent together with the notice of termination of service. The learned counsel urges that under these circumstances, when the petitioners have complied with the provisions of Section 5(3), the Tribunal was incorrect in setting aside the order of termination dated 26.11.1996. The learned counsel for the petitioners relied on the judgment in the case of **Krishnadevaraya Education Trust & anr. v/s L.A.Balakrishna, reported in (2001) 9 SCC 319,** in support of his submission.

7. The learned counsel appearing for the respondent submits that there is no perversity in the findings of the School Tribunal requiring interference from this

Court. According to the learned counsel, the submission of the learned counsel for the petitioners that the order is not stigmatic, is incorrect. He submits that the order was issued only because two memos were issued to the respondent in which it was alleged that the respondent had been negligent in his duties. He submits that since these memos were the foundation for the action taken against the respondent, an enquiry ought to have been held against him prior to his termination of services. The learned counsel further urges that when the action of the management is motivated and initiated because of the complaints received from the parents of the pupils, an enquiry should have been held. The learned advocate then relies on the judgment of the learned Single Judge of this Court in the case of **Shikshan Prasarak Mandal v/s Presiding Officer, School Tribunal, Amravati & anr., reported in 2005(4) Mh.L.J. 485** and in the case of **Narayan Baliram Patil v/s Presiding Officer, School Tribunal, Aurangabad & ors., reported in 2005 (3) Mh.L.J. 276,** in support of his submission that there was no material before the Tribunal to indicate that action had been taken against the respondent because the respondent's behaviour was unsatisfactory.

8. Undoubtedly, the letter issued to the respondent

terminating his services is not stigmatic. It only mentions that he was found to be unsuitable for the post of Assistant Teacher and, therefore, his services were being terminated. He was paid salary for one month in lieu of notice together with the letter of termination. Section 5(3) of the M.E.P.S. Act provides that a probationer may be terminated from service if his work or conduct is found to be unsatisfactory. While doing so the management is expected to give him one month's notice or to pay him one month's salary in lieu of notice. In the present case, there is no doubt that the respondent has been paid salary of one month in lieu of notice. Therefore, the Tribunal was incorrect in concluding that the management has illegally exercised its powers under Section 5(3) of the M.E.P.S. Act.

9. When a probationer is to be terminated from service there must be some material for the management to conclude that his services were unsatisfactory. In the present case, the management has highlighted the fact that the respondent had been irresponsible when the examinations were held on 4th and 6th March, 1996. Memos have been issued to the first respondent in order to give him an opportunity to improve and work in a proper manner. However, it appears that the behaviour and work of the respondent did not improve and the

petitioners, left with no other alternative, terminated his services under Section 5(3) of the M.E.P.S. Act.

10. In the case of **H.F.Sangati v/s Registrar General, High Court of Karnataka & ors., reported in (2001) 3 SCC 117,** the Supreme Court has observed that the services of a probationer can be terminated if motivated by certain allegations which tantamount to misconduct but do not form the foundation on a simple order of termination. In the case of **Krishnadevaraya Education Trust and anr. v/s L.A. Balakrishna, reported in (2001) 9 SCC 319,** the Supreme Court has observed thus:-

> "5. There can be no manner of doubt that the employer is entitled to engage the services of a person on probation. During the period of probation, the suitability of the recruit/appointee has to be seen. If his services are not satisfactory which means that he is not suitable for the job, then the employer has a right to terminate the services as a reason thereof. If the termination during probationary period is without any reason, perhaps such an order would be sought to be challenged on the ground of being arbitrary. Therefore, naturally services of an employee on probation would be terminated, when he is found not to be suitable for the job for which he was engaged, without assigning any reason. If the order on the face of it states that his services are being terminated because his performance is not satisfactory, the employer runs the risk of the allegation being made that the order itself casts a stigma. We do not say that such a contention will succeed. Normally, therefore, it is preferred that the order itself does not mention the reason why the services are being terminated.

> 6. If such an order is challenged, the employer will have to indicate the grounds on which the services of a probationer were terminated. Mere fact that in response to the challenge the employer states that the services were not satisfactory would not ipso facto mean that the services of the probationer were being terminated by way of punishment. The probationer is on test and if the services are found not to be satisfactory, the employer has, in terms of the letter of appointment, the right to terminate the services."

11. In my view, therefore, the petitioners had not committed any illegality in terminating the services of the respondent when he was on probation by tendering one month's wages in lieu of notice at the time his services were terminated. This termination of service has been effected in accordance with the provisions of Section 5(3) of the M.E.P.S. Act.

12. The submission of the learned advocate for the respondent is without merit. In the present case, there was no question of issuing a charge-sheet to the respondent since the action taken against him was not because of any misconduct committed by him but in fact was as a result of his unsatisfactory performance of work and behaviour. In the case of **Narayan Baliram Patil v/s Presiding Officer, School Tribunal, Aurangabad & ors., reported in 2005 (3) Mh.L.J. 276,** the learned Single Judge of this Court of Nagpur Bench has held

that, where the order of termination reveals that the that the employee is liable to be punished for misconduct for wilful and persistent negligence of duty and for incompetence, the services of such an employee could not be terminated by exercising powers under Section 5(3) of the Act. It was held that the termination order per se reveals that the petitioner was charged with a misconduct and that he deserves to be punished for the same. In such circumstances, the learned Judge B.P.Dharmadhikari, J. had held that the action of the management in terminating the services of the employee under Section 5(3) was uncalled for. Reliance has also been placed by the learned advocate for the respondent on the judgment in the case of **Shikshan Prasarak Mandal, Wani v/s Presiding Officer, School Tribunal, Amravati & anr., reported in 2005 (4) Mh.L.J. 485.** This judgment has no relevance to the facts involved in the present case. There was no material on record in that case to indicate that the behaviour or performance of the employee during the probation period was unsatisfactory. In the present case, there was ample material to demonstrate that the conduct and performance of the respondent No.1 was unsatisfactory.

13. In the present case, I have already observed that

the order of termination is not stigmatic although the causa causans or foundation of the order is the memos which were issued to the respondent, indicating that his work was not satisfactory.

14. Petition allowed. The order of the School Tribunal is set aside. Rule made absolute. No order as to costs.

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